UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL MAIER, Plaintiff, v. JOHN LOVICK, et al., Defendants.	CASE NO. C09-0993-JCC REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff proceeds *pro se* and *in forma pauperis* in this 42 U.S.C. § 1983 action. He names Snohomish County Sheriff John Lovick and Snohomish County Jail Sergeant Jon Bates as defendants. Plaintiff asserts that he was twice pepper sprayed at Snohomish County Jail on July 1, 2009, and alleges he was subsequently denied a shower for two and a half hours, toilet paper for three hours, and the return of his clothes for some six days. (Dkt. 5 at 3.)

Defendants seek dismissal of plaintiff's claims on summary judgment. (Dkt. 14.) Plaintiff did not respond to the motion for summary judgment. The Court deems plaintiff's

failure to oppose the dispositive motion to be an admission that defendants' motion has merit. *See* Local Civil Rule 7(b)(2). The Court further finds, having considered the motion and supporting documents, as well as the balance of the record in this matter, that defendants' motion for summary judgment should be granted and this case dismissed.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Celotex*, 477 U.S. at 322-23. The court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994).

Plaintiff here pursues claims pursuant to 42 U.S.C. § 1983. In order to sustain a § 1983 claim, plaintiff must show (1) that he suffered a violation of rights protected by the Constitution or created by federal statute, and (2) that the violation was proximately caused by a person acting under color of state or federal law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

The Court first addresses plaintiff's identification of Lovick as a defendant. A plaintiff in a § 1983 action must allege facts showing how individually named defendants caused or personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A plaintiff may not hold supervisory personnel liable under §

1983 for constitutional deprivations under a theory of supervisory liability. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, a plaintiff must allege that a defendant's own conduct violated the plaintiff's civil rights.

In this case, plaintiff fails to allege any facts showing how Lovick violated his civil rights. In fact, plaintiff does not mention Lovick in stating his claims. (*See* Dkt. 5 at 3.) Instead, the only mention of Lovick consists of his identification as a defendant in the caption of the complaint. (*Id*.) Lovick asserts that he had no personal contact or involvement whatsoever with plaintiff during plaintiff's 2009 incarceration. (Dkt. 16, ¶ 4.) Accordingly, plaintiff fails to state a claim against Lovick and his complaint is subject to dismissal on this basis.[1]

Nor do plaintiff's claims against Bates withstand scrutiny. Plaintiff describes events following his booking into Snohomish County Jail on July 1, 2009 as follows:

> I had an argument with a Sgt. when I could not be cuffed through the tray slot because of a prior injury, he sprayed me with pepper spray. After that he made me strip down and go to a padded cell. My vision grew blurry and I couldn't accurately see the slot to hand my clothes through, so the Sgt. sprayed me again. I sat for 2 ½ to 3 hrs burning before I was allowed to shower. Finally, I was allowed to go to 4 north. There I tried to get toilet paper for 3 hours. Finally, I wiped with my sheet and flooded my cell when I flushed. I was written up and charged $50.00 for some made up damage[.] It is now 7-7-09 6 days later and still my t shirt, black boxers, and socks have not been returned.

(Dkt. 5 at 3.) He asserts that he unsuccessfully attempted to grieve these incidents and was written up several additional times "for no apparent reason other than the fact they don't like

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1 Defendants also argue that any claims against Snohomish County Corrections should be dismissed. However, while the Court identified Snohomish County Corrections as a defendant in serving plaintiff's complaint (*see* Dkt. 6), a review of the complaint reveals that plaintiff did not name this entity as a defendant. As such, the Court clarifies herein that Snohomish County Corrections is not a party to this action.

me." (*Id*.) Plaintiff seeks $50,000.00 for pain, suffering, and loss of his clothing. (*Id*. at 4.)

Plaintiff's challenge to the use of pepper spray presents an excessive force claim. Because it appears plaintiff was a pre-trial detainee at the time of this incident, his claim of excessive force is analyzed under the Fourth Amendment's "objective reasonableness" standard; that is, whether the use of force was objectively reasonable in light of the facts and circumstances, without regard to underlying intent or motivation. *Lolli v. County of Orange*, 351 F.3d 410, 415 (9th Cir. 2003) (citing *Graham v. Conner*, 490 U.S. 386, 397 (1989)). In considering this claim, the Court balances "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'" *Id*. (quoting *Graham*, 490 U.S. at 396) (internal quotation marks omitted). Among the factors that must be considered are "whether the [individual] poses an immediate threat to the safety of the officers or others," and "whether he is actively resisting." *Graham*, 490 at 396. *Accord Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921 (9th Cir. 2001). The Supreme Court made clear in *Graham*, 490 U.S. at 396, that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight."

The remaining issues discussed in plaintiff's complaint appear to present a substantive due process challenge to conditions of confinement.[2] As a pretrial detainee, plaintiff's substantive due process claim is reviewed under "'the more protective fourteenth amendment standard.'" *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (quoting *Gary H. v. Hegstrom*,

2 Plaintiff does not identify responsible defendants in association with some of these issues. The Court assumes for the purposes of this Report and Recommendation that plaintiff seeks to hold Bates responsible for the entirety of his conditions of confinement claim.

831 F.2d 1430, 1432 (9th Cir. 1987)). *But cf. Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir. 1998) ("Because pretrial detainees' rights under the Fourteenth Amendment are comparable to prisoners' rights under the Eighth Amendment, however, we apply the same standards.") "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

In considering such a claim, the Court looks to "whether there was an express intent to punish, or 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purposes assigned [to it].'" *Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004) (quoting *Bell*, 441 U.S. at 538). "For a particular governmental action to constitute punishment, (1) that action must cause the detainee to suffer some harm or 'disability,' and (2) the purpose of the governmental action must be to punish the detainee." *Id*. at 1029. Further, "to constitute punishment, the harm or disability caused by the government's action must either significantly exceed, or be independent of, the inherent discomforts of confinement." *Id*. at 1030.

"[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Bell*, 441 U.S. at 546. *Accord Jones*, 393 F.3d at 932 ("Legitimate, non-punitive government interests include ensuring a detainee's presence at trial, maintaining jail security, and effective management of a detention facility.") Moreover, corrections administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547.

In a declaration accompanying the motion for summary judgment, Bates asserts he was informed plaintiff was being held in a transitional cell because he refused to submit to a strip search after a pen taken from the booking area was found in his possession and became "hostile and violent[,]" kicking and banging on the cell door, and shouting obscenities at jail officers. (Dkt. 15, ¶¶ 7-8.) Bates unsuccessfully attempted to speak with plaintiff. (*Id*., ¶ 11.) He was thereafter informed that plaintiff made a suicidal threat and, in accordance with jail policies, cleared the booking area to prepare for plaintiff's move to a "soft cell." (*Id*., ¶ 12.) Bates ordered plaintiff to "cuff up" by placing his hands in the "cuff port" in the cell door so that he could be handcuffed prior to transport. (*Id*., ¶ 13.) After plaintiff refused to comply and in light of the threat of self harm, Bates informed plaintiff he would employ pepper spray upon plaintiff's continued refusal to comply. (*Id*., ¶ 14.) Plaintiff continued to ignore the order and put his t-shirt over his face. (*Id*.) Bates sprayed a burst of pepper spray and left the scene after plaintiff again indicated he would not comply. (*Id*., ¶ 15.) Approximately fifteen minutes later, plaintiff expressed his intent to cooperate and jail staff handcuffed plaintiff and moved him to a different cell. (*Id*.)

Bates further indicates that, because all inmates placed on suicide watch must wear specialized clothing designed to keep them from carrying out threats of self harm, he directed plaintiff to remove his clothes following the cell transfer. (*Id*., ¶ 16.) After plaintiff twice refused to abide by this order, Bates again sprayed plaintiff with pepper spray, leading to plaintiff disrobing as directed. (*Id*.) Bates asserts that jail staff gave plaintiff multiple towels and cups of water following these incidents. (*Id*., ¶ 17.) He maintains that, in both instances, he employed the pepper spray solely due to his concerns for plaintiff's safety and the safety of

jail employees, and in accordance with jail policies. (*Id*., ¶ 18.)

Defendants also submit a declaration from Patricia Pendry, Records and Data Management Supervisor for the Corrections Bureau of the Snohomish County Sheriff's Office. (Dkt. 17.) Pendry notes that plaintiff has been booked into the jail on six occasions since July 1, 2007 and was the subject of multiple disciplinary hearings during his stay at the jail following his July 1, 2009 booking. (*Id*., ¶¶ 2-3.) Pendry states that jail records reflect plaintiff threatened to flood his jail cell on July 3, 2009, proceeded to flood his cell and surrounding areas by putting a bath towel in the toilet and flushing, and later admitted his attempt to flood his cell, stating he did not care about the consequences of his actions. (*Id*., ¶ 4.) She also states that jail records reflect that, on July 5, 2009, plaintiff repeatedly pushed the emergency call button in his cell for no apparent reason, verbally abused responding jail employees, and continuously kicked his cell door while yelling, repeated his behavior with respect to the emergency call button on July 7, 2009, and, on that same day, affixed paper to the walls of his cell using toothpaste. (*Id*., ¶ 5.)

In sum, defendants provide both a detailed description of the events pertinent to plaintiff's claims and reasonable explanations for the actions taken in relation to those events. As noted above, plaintiff did not respond to the motion for summary judgment. Plaintiff's complaint contains no more than conclusory allegations of excessive force and unconstitutional conditions of confinement. Conclusory allegations are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist. *See Project Release v. Prevost*, 722 F.2d 960, 969 (2d Cir. 1983). *Accord Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) ("Sweeping conclusory allegations will not suffice to prevent summary judgment.")

Because plaintiff fails to satisfy his burden of showing a genuine issue of material fact exists, defendants' motion for summary judgment should be granted.

Defendants contend that plaintiff's claims are clearly frivolous and ask that, accordingly, the dismissal of this case count as a "strike" against plaintiff pursuant to 28 U.S.C. § 1915(g) ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.") However, because it is not entirely clear that plaintiff's claims were brought with frivolous or malicious intent, the Court declines to recommend that this dismissal count as a strike.

For the reasons stated above, the Court recommends that defendants' motion for summary judgment (Dkt. 14) be GRANTED and this case DISMISSED with prejudice.[3] A proposed order accompanies this Report and Recommendation.

DATED this 26th day of March, 2010.

Mary Alice Theiler
United States Magistrate Judge

3 Finding dismissal appropriate for the reasons stated above, the Court declines to address any additional arguments raised in defendants' motion for summary judgment.